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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1971.

No. 72-383

TEXACO INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

		Page
I.	Opinions Below	1
II.	Jurisdiction	2
III.	Questions Presented	2
IV.	Constitutional and Statutory Provisions Involved	3
V.	Statement of the Case	4
VI.	Reasons for Granting the Writ	7
	1. The Section 7 Rights of Employees Attempting to Organize Into a Union Should Not Be Equated With the Section 7 Rights of Employees in a Well Established Union	7
	2. The Decisions of the Courts Below Are in Conflict in Interpreting the Decisions of This Court Which Accommodate Employer Property Rights With Section 7 Rights of Employees	10
VII.	Conclusion	12
Appendix A—Court of Appeals Opinion		A1
Appendix B—Court of Appeals Judgment		A7
Appendix C—Court of Appeals Order Denying Rehearing		A9
Appendix D:		
	Decision and Order of the Board	A10
	Trial Examiner's Decision	A14

TABLE OF CITATIONS.

Cases: Page

Central Hardware Co. v. NLRB, — U. S. —, 33 L. Ed. 2d 122 7,8

Collyer Insulated Wire, 192 NLRB No. 150, 77 LRRM 1931 (1971) 7

Diamond Shamrock Co. v. NLRB, 443 F. 2d 52 (3rd Cir., 1971) 10,11

National Steel Corp. v. NLRB, 415 F. 2d 1231 (6th Cir., 1969) 10,11

NLRB v. Babcock & Wilcox Co., 351 U. S. 105 (1956) 2, 8, 10, 11

NLRB v. Rockwell Mfg. Co., 271 F. 2d 109 (3rd Cir., 1959) 10

NLRB v. United Aircraft Corp., 324 F. 2d 128 (2nd Cir., 1963) 10

NLRB v. United Steelworkers, 357 U. S. 357 (1958) ..2, 8, 9, 10, 11

Peyton Packing Co., 49 NLRB 828 .....5, 11

Republic Aluminum Co. v. NLRB, 394 F. 2d 405 (5th Cir., 1968) 10

Republic Aviation Corp. v. NLRB, 324 U. S. 793 (1945) 7, 8, 9, 10, 11, 12

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 519, 29 U. S. C., Sec. 151 *et seq.*) 2, 3, 5, 9, 12

28 U. S. C. § 1254(1) 2

Constitution of the United States, Amendment V 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. .

TEXACO INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, TEXACO INC., respectfully prays that a Writ for Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW.

The opinion of the court of appeals (App. A, A1-A6) is not yet officially reported. The decision and order of the Board (App. D, A11-A34) are reported at 189 NLRB No. 51.

JURISDICTION.

The judgment of the court of appeals (App. B, A7-A8) was entered June 6, 1972, and the Company's timely petition for rehearing and hearing *en banc* was denied on June 26, 1972 (App. C, A9). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the property rights of an employer are so outweighed by the rights conferred upon its union employees by Section 7 of the National Labor Relations Act that the employer is presumed to have violated the Act by refusing to allow the distribution of Union literature on its property where (1) the employees are already organized in a well-established union and no organizational activity is involved; (2) there were effective alternate means available to the Union leadership to communicate with their membership; and (3) the literature sought to be distributed made untrue statements about the employer and urged a boycott of its products.

2. Whether this Court's decisions in *NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105 (1956) and *NLRB v. United Steelworkers*, 357 U. S. 357 (1958) require evidence and findings of inadequate alternate avenues of communication when an employer declines to dedicate a portion of its property to the distribution of Union literature.

3. Whether the interests of employees represented by a Union which has historically bargained on their behalf with their employer should be equated with those of employees engaged in a Union organizational campaign where employee Section 7 rights must be balanced against employer property rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitution of the United States, Amendment V, provides in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law . . ."

Section 7 of the National Labor Relations Act provides, in pertinent part, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employee to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7."

STATEMENT OF THE CASE.

Petitioner, Texaco Inc., seeks to set aside an Order of the National Labor Relations Board requiring the Company to permit its employees, who are members of a well-established Union, to distribute certain Union literature on the Company's premises in a non-work area on non-work time. The Company contends that its unionized employees had effective alternate means of communicating with their fellow Union members and that the literature in question contained untrue statements concerning the Company and urged a boycott of its products.

The Company's employees have for many years been represented by a Union, Local 8-638, Oil, Chemical and Atomic Workers. Until December, 1968, the Union distributed literature to its members at the Company's plant gate in Westville, New Jersey. In December, 1968, during collective bargaining negotiations, the Company agreed to permit the distribution of Union literature on Company property so long as it was not "political, ethnic or other undesirable literature."

The Union distributed any and all of its literature to its members on Company property without incident after this agreement until January 2, 1970, when the Company refused to permit distribution of a particular piece of literature which it found undesirable because the literature falsely accused the Company of having "taken a position of non-recognition of OCAW at various location[s]" and in retaliation for this and other alleged wrongs the literature urged the employees to mutilate their Company credit cards and return them to the Company.

After the Company declined to permit the distribution in question on its property, the Union distributed the leaflet to its members outside the plant gate, but filed an unfair labor practice charge against the Company.

The Board's Regional Director refused to issue a complaint, finding that "[t]o permit distribution of this type Union literature would mean that the Employer would, in a sense, be financing activities on its premises which were clearly inimical to its self-interest."

The Union appealed the dismissal to the Board's General Counsel who issued a complaint against the Company. After a hearing, a trial examiner issued a decision citing *Peyton Packing Co.*, 49 NLRB 828 for the principle "that here the Union officials, as employees, had the protected right to distribute the material on January 2, in the non-working area on the [Company's] premises absent a showing that the distribution would in some manner be destructive of plant production or discipline" (App. D, A25).

The Company's argument that the distribution made at the plant gate was an effective alternate means of distribution was rejected as a misconception of "the distinction between the rights of employees and non-employees as set forth [by this Court] in *Babcock & Wilcox, supra*" (App. D, A31). The decision holds that the Act gives employees the presumptive right to distribute union literature to fellow employee union members on non-work time, in non-work areas of the Company's premises and the Company has the burden of showing the distribution would interfere with production or discipline. The decision found that the Company failed to meet this burden and therefore violated Section 8(a)(1) of the Act.

Two Board members, Fanning and Jenkins, adopted and approved the trial examiner's decision without comment, but Chairman Miller dissented, finding the purposes of the Act would not be effectuated by requiring the Company to permit distribution on its property of Union literature "which is not only inaccurate but which urges employees to mutilate and return their credit cards thus

encouraging, in effect, a boycott by employees of their Company's own product".

The court of appeals accepted the Board's presumption that employees possess a "normally recognized privilege to distribute Union literature on the premises" and concluded that it need only decide "simply whether as Terrace contends, the content of a particular leaflet placed its distribution" outside that privilege. The court of appeals ignored the Company's contentions that the employees were well organized in an established union; that the Union employees had effective alternate means of communication; and that these factors should have been weighed by the Board.

REASONS FOR GRANTING THE WRIT.

The holding of the court below that employees already organized in a well-established union have a normally recognized privilege to distribute union literature on their employer's premises without regard to whether they possess an effective alternate means of communication, conflicts with a recent decision of this Court and is contrary generally to principles enunciated by this Court and in other decisions of the courts of appeals. Resolution of the issues presented is of manifest importance in determining the proper balance between employer property rights and the rights of employees to distribute union literature. The problem is a recurring one in the administration of the Act, and therefore review by this Court is warranted.

1. The Section 7 Rights of Employees Attempting to Organize Into a Union Should Not Be Equated With the Section 7 Rights of Employees in a Well Established Union.

In *Central Hardware Co. v. NLRB*, — U. S. —, 33 L. Ed. 2d 122, decided June 22, 1972, this Court reaffirmed that "[t]he Board and the courts have the duty to resolve conflicts between organization rights and property rights, and to seek a proper accommodation between the two." — U. S. —; 33 L. Ed. 2d 122, 126 (1972). The important issue raised in this case is the proper accommodation between property rights and the rights of employees already organized in a well-established union.

The decision below makes no distinction between the rights of organized employees and the rights of employees attempting to organize. It gives no consideration to the alternative means of communication that was obviously present in this case and it fails to make the proper distinc-

tion between an employer no-distribution rule and a ruling by an employer that a specific piece of literature is objectionable.[1]

The decision below rests upon *Republic Aviation Corp. v. NLRB*, 324 U. S. 793 (1945) where this Court found no error in the adoption by the Board of the so-called "Peyton Packing presumption"[2] in the setting of an organizational campaign. Following *Republic Aviation*, *supra*, this Court has resolved other issues involving the communication rights of employees and non-employees engaged in organizational activities. *NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105 (1956) held that the availability of alternative means of communication made the intrusion on the employer's property rights by non-employees unwarranted. *NLRB v. Steelworkers*, 357 U. S. 357 (1958) held that the Board must make a finding with respect to "alternate channels available for communications" as an indispensable element to finding an employer guilty of an unfair labor practice in the enforcement of a valid no-solicitation rule against its employees. Most recently, the *Central Hardware* case, *supra*, reaffirmed the rationale of the *Babcock & Wilcox* decision, *supra*, that where employee organiza-

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1. In the proceedings below, the Company argued that it had not agreed to permit distribution of the type of literature in question. Since there was a question of whether the agreement between the parties had been violated, this case should have been dismissed by the Board so that the Union would have been forced to employ the grievance and arbitration procedure of the collective bargaining agreement. See: *Collyer Insulated Wire*, 192 NLRB No. 150, 77 LRRM 1931 (1971).

2. "It is therefore not within the province of an Employer to promulgate and enforce a rule prohibiting Union solicitation by an employee outside of working hours, although on Company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and, therefore, discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." 49 NLRB at 843-44.

tional rights must be accommodated to private property rights, alternative means of communication must be examined by the Board and the courts.

Significantly, this Court cautioned that the "yielding" of property rights is required "only in the context of an organization campaign". 33 L. Ed. 2d at 127. Moreover, after the requisite need for access to the employer's property has been shown, the access is limited to "(i) Union organizers; (ii) prescribed non-working areas of the employer's premises; and (iii) the duration of organization activity". 33 L. Ed. 2d at 127.

We have found no decision of this Court holding that the property rights of an employer must "yield" to the Section 7 rights of its organized employees. While a proper accommodation between an employer's constitutionally protected property rights and the Section 7 rights of the employer's organized employees to communicate with their fellow union members is required, we urge that the Board and the court below erred in applying the "Peyton Packing presumption" without making a finding concerning the availability of effective alternative means of communication. The application of the presumption led the Board to hold that even though the employee union officials were able to distribute the literature off Company property, this was irrelevant; it led the court of appeals to ignore alternative means of communication altogether.

The decisions of this Court since *Republic Aviation*, *supra*, lead ineluctably to the conclusion that the Board and courts are required in each instance to weigh all the relevant facts where constitutionally protected property rights are at issue. Mechanical answers do not avail for the solution of non-mechanical complex problems of labor-management relations. The communications problems of unorganized employees are not the same as the communications

problems of employees in a well-established union. Manifestly, the rights of organized employees to insist that their employer relinquish its property rights to aid inter-union communication should not weigh as heavily in the balance as do the rights of employees to communicate among themselves when they are struggling to organize.

2. The Decisions of the Courts Below Are in Conflict in Interpreting the Decisions of This Court Which Accommodate Employer Property Rights With Section 7 Rights of Employees.

The decisions of the courts of appeals as to the proper interpretation of this Court's decisions in *Republic Aviation Corporation v. NLRB*, 324 U. S. 793 (1945); *NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105 (1956); and *NLRB v. United Steelworkers of America*, 357 U. S. 357 (1958) are in conflict. The court below reviewed these decisions in *NLRB v. Rockwell Mfg. Co.*, 271 F. 2d 109 (3rd Cir., 1959) and concluded that where an employer was charged with a violation of the Act because it enforced against its employees a rule prohibiting distribution on Company premises of all literature, the Board was bound to consider not only employer evidence as to the impact the rule had on plant discipline and production, but also the effect the rule had on the ability of the employees to communicate and organize. In *Diamond Shamrock Co. v. NLRB*, 443 F. 2d 52 (3rd Cir., 1971), the court below reaffirmed its holding in *Rockwell Mfg. Co., supra*, after noting "that three courts of appeals have specifically considered and rejected [its] reasoning in *Rockwell Mfg.* See *National Steel Corp. v. NLRB*, 415 F. 2d 1231 (6th Cir., 1969); *Republic Aluminum Co. v. NLRB*, 394 F. 2d 405 (5th Cir., 1968) (en Banc); *NLRB v. United Aircraft Corp.*, 324 F. 2d 128 (2d Cir., 1963) cert. denied, 376 U. S. 951 (1964)." 443 F. 2d at 60 fn. 27.

The *Diamond Shamrock* decision involved the proper balance to be struck between an employer's rule barring off-duty employees from all non-production areas of the plant, including secured areas, and the rights of employees in an organizational campaign to solicit union support in such areas. The Third Circuit held that the case involved constitutionally protected property rights as opposed to the right to maintain discipline and, therefore, the *Peyton Packing* presumption was inappropriate in light of the mandate of *Babcock & Wilcox, supra.* Moreover, the court held that the effect of this Court's decision in *Babcock & Wilcox, supra,* and *United Steelworkers, supra,* upon *Republic Aviation, supra,* was to require the Board to consider the element of alternative means of communication before invalidating a no-distribution rule which an employer has attempted to justify. In support of its conclusion the court cited the opinion of three dissenting justices in *Avondale Mills,* the companion case to *NLRB v. United Steelworkers, supra,* where they asserted "there has heretofore been no indication that . . . evidence and findings [of inadequate alternative avenues of communication] were indispensable elements to every case in which these employer rules were being examined". 357 U. S. at 367; 443 F. 2d at 60, fn. 27.

As indicated above, in *National Steel Corp. v. NLRB,* 415 F. 2d 1231, 1234 (6th Cir., 1969), the Sixth Circuit rejected the Third Circuit's interpretation, indicating that "the availability of other avenues of communication is generally irrelevant in determining the validity of a no-distribution rule as applied to employees". 415 F. 2d at 1233, citing cases.

As indicated above, the Fifth and Second Circuits have specifically disagreed with the Third Circuit and declined to interpret *Babcock & Wilcox, supra,* and *United Steelworkers, supra,* as modifying or overruling their interpre-

tation of *Republic Aviation, supra.* It should be noted, however, that this Court and the Board made findings directly related to the availability of alternative means of communication in *Republic Aviation Corp., supra.* (See 324 U. S. at 797 and 359 U. S. at 367 dissenting opinion).[3] Therefore, the Third Circuit's interpretation of the decisions of this Court do not amount to a conclusion that *Republic Aviation, supra,* has been overruled.

It is urged, however, that this Court should resolve the conflicting interpretations of its decisions as to the proper method to be employed in accommodating property rights and Section 7 rights.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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3. This Court recited the following facts concerning the LeTourneau Company plant in Georgia: "The company's plant for the manufacture of earthmoving machinery and other products for the war is in the country on a six thousand acre tract. The plant is bisected by one public road and built along another. There is one hundred feet of company-owned land for parking or other use between the highways and the employee entrances to the fenced enclosures where the work is done, so that contact on public ways or on non-company property with employees at or about the establishment is limited to those employees, less than 800 out of 2100, who are likely to walk across the public highway near the plant on their way to work, or to those employees who will stop their private automobiles, buses or other conveyances on the public roads for communications. The employees' dwellings are widely scattered." 324 U. S. at 793.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1281.

TEXACO INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

ON PETITION TO REVIEW AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Argued January 3, 1972

Before SEITZ, *Chief Judge*, and HASTIE and J. ROSEN, *Circuit Judges*.

Opinion of the Court.

(Filed May 4, 1972)

HASTIE, *Circuit Judge*.

We here review an order of the National Labor Relations Board upon a petition of Texaco Inc. to set that order aside and a cross-application of the Board for its enforcement. In dispute is the Board's decision that Texaco violated Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U. S. C. §158(a)(1) by refusing to allow its employees to distribute certain union literature in a non-work area of its premises during non-work time.

At all relevant times the employees were represented by Local 8-638, Oil, Chemical and Atomic Workers. The distribution of union literature within the plant was covered by an outstanding agreement between the company and the union. It was agreed that union literature might be distributed during non-work time in a designated area near the enterance of the plant. The union asserted that it would not distribute "political, ethnic or other undesirable literature."

The episode that created the present dispute began when union officers requested time off to distribute a particular leaflet in the approved area of the company premises. A copy of the leaflet was left at the plant Employee Relations Office. After reading the document, an employee relations officer asked that distribution be postponed until he could confer with other management officers. The union complied with this request. Thereafter, management advised the union that the leaflet contained "undesirable" matter and asked that it not be distributed on company property. The union then distributed the leaflet on public property outside the entrance to the plant and filed an unfair labor practice charge based upon the company's refusal to permit this particular distribution on company property.

The portion of the leaflet to which Texaco objected reads as follows:

> "In November, we attended a special Texaco Nationwide [Union] Council Meeting. Many problems were discussed and One requires your cooperation . . . . Over the past several months, Texaco has taken a position of non-recognition of OCAW at various location[s], in particular, the Ventura [Producing] District in California and at Sales Terminals in Port Arthur, Houston, Dallas, San Antonio and Fort Worth,

Texas, Tulsa Oklahoma and Lake Charles, La. Attemps to decertify OCAW, have been made at many other locations, including Claymont, Delaware. This company is using their power, to influence members of our union to abandon the principle of unity . . . . Without a strong union, which we now have, a return to the so called good old days would only be around the corner. Enclosed, is a suggested letter that you may send along with your mutilated credit card to Texaco Inc. If we let this Company know that their policy of Divide and Conquer will not succeed, we will all have a Happy New Year in 1971."

The "suggested letter" attached to the leaflet charged that Texaco has embarked on an anti-union campaign by granting wage increases to non-union sales employees at a facility in Texas and refusing increases to union employees.

It is not disputed that Section 7 of the National Labor Relations Act sanctions the distribution of union literature on the employer's premises at appropriate times and places.[1] And in this case there is no denial that the proposed place and time of distribution were appropriate. Moreover, the employer's ban did not apply to the distribution of all union literature, or indeed any literature except a particular leaflet. We have to decide simply whether, as Texaco contends, the content of a particular leaflet placed its distribution outside the normally recognized privilege to distribute union literature on the premises.[2]

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1. *Republic Aviation Corp. v. N. L. R. B.*, 1945, 324 U. S. 793; *National Steel Corp. v. N. L. R. B.*, 6th Cir. 1969, 415 F. 2d 1231.

2. In answering this question we are not aided by our recent decision in *Diamond Shamrock Co. v. N. L. R. B.*, 3d Cir. 1971, 443 F. 2d 52, which appellant has discussed at some length. For what we approved in that case was an employer's refusal to permit any union solicitation in specified parts of a plant.

Texaco makes three points: that the leaflet, by recommending that employees mutilate and surrender their credit cards, urged the employees to boycott Texaco products and thus be "disloyal" to their employer; that the leaflet contained untrue statements amounting to false charges of anti-unionism against Texaco, and that the employer had properly found the leaflets "undesirable" within the meaning of the union's undertaking not to distribute "political, ethnic or other undersirable literature."

The argument that distribution of the leaflet was not privileged because it recommended "disloyal" action is bottomed upon the familiar *Jefferson Standard Broadcasting case.*[3] But that decision turned upon the Court's determination that a public charge by employees, that the television station which employed them had inadequate equipment and broadcast inferior and uninteresting programs, was a type of disloyal activity unprotected by the Act because it was a dispargement of the employer's product not made in the context of an appeal for support in a labor dispute.

In contrast, the present leaflet, most broadly construed, did no more than urge employees to put pressure on their employer to stop alleged anti-union activity by threatening to withhold their patronage as purchases of the employer's products. Certainly the Act protects employees in appeals, by picketing or by the distribution of literature, to the public to withhold patronage from their employer in protest against his alleged anti-union activity.[4] It cannot be less acceptable for employees to take the less drastic step of threatening to withhold their own patronage for the same reason.

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3. *N. L. R. B. v. Local Union No. 1229*, 1953, 346 U. S. 464.

4. *N. L. R. B. v. Fruit and Vegetable Packers*, 1964, 377 U. S. 58, *N. L. R. B. v. Hollywood Brands, Inc.*, 7th Cir. 1968, 398 F. 2d 284; *N. L. R. B. v. Crowley's Milk Co.*, 3d Cir. 1953, 208 F. 2d 444.

Next, it is said that the leaflet was not privileged union literature because it employed false statements of fact to make the employer appear anti-union. The leaflet charged that Texaco had "taken a position of non-recognition of" the union at various other plants. Actually, the record shows that Texaco had succeeded, albeit in a lawful manner, in having the union decertified at two facilities and thereafter had granted wage increases to unorganized workers at those facilities. In addition, this employer had successfully resisted union strikes over working conditions.

Technically, none of those acts constituted "non-recognition" of the union. However, the accompanying form of letter, that employees were asked to sign as a protest against the wrongs set out in the leaflet, made it clear that the conduct loosely and inaccurately called "non-recognition" was Texaco's refusal to accede to union demands at some facilities and its granting of preferential treatment to non-union employees at others. Actually, such conduct is not very different from "non-recognition" in its impact upon the effectiveness and the standing of the union. In these circumstances, the trial examiner found, and the Board agreed, that the statement in question, though not technically correct, was "not deliberately or maliciously inaccurate." Moreover, quoting the trial examiner: "It is well settled that misstatements made in the course of concerted activity which denounce an employer for his conduct in labor relations . . . only forfeit the statutory protection when it is evident that the statements are deliberately or maliciously false."[5] Accordingly, we conclude that the Board was justified in holding that the inaccuracy in the leaflet was not such as to excuse the employer's refusal to permit distribution of this union literature on its premises.

5. *Accord, Owen Corning Fiberglas Corp. v. N. L. R. B.*, 4th Cir. 1969, 407 F. 2d 1357; *Walls Mfg. Co. v. N. L. R. B.*, D. C. Cir. 1963, 321 F. 2d 753, *cert. denied* 375 U. S. 923.

The final contention of appellant is that the promise of the union not to distribute "undesirable" literature effectively waived the employees' right to distribute the leaflet in question.[6] The courts and the Board have repeatedly held that a relinquishment or waiver of a protected right must be "clear and unmistakable."[7] It is not clear on its face what the union's promise meant in this case. A union participant in the discussion that resulted in the union's promise said that he understood "undesirable" to mean profane, vulgar or socially unacceptable. Management takes the view that "undesirable" includes anything that reflects unfavorably upon the employer and is not strictly accurate. We have pointed out that, but for the promise in question, the distribution of the leaflet would have been protected activity. We hold that the union's undertaking was ambiguous and, therefore, should not be construed as waiving the otherwise protected right to distribute a recital of alleged anti-union activity coupled with a call for concerted action in protest against the employer's conduct.

The petition to set aside the order of the Board will be denied and the order will be enforced.

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6. Like the Board, we leave open the question whether even an unambiguous waiver of the privilege of distributing such literature as we have here would be legally effective. *Cf., N. L. R. B. v. Mid States Metal Products, Inc.*, 5th Cir. 1968, 403 F. 2d 702.

7. *United Aircraft Co. v. N. L. R. B.*, 2d Cir. 1971, 440 F. 2d 85; 2d Cir. 1971, 440 F. 2d 85; *N. L. R. B. v. Perkins Mach. Co.*, 1st Cir. 1964, 326 F. 2d 488; *Timken Roller Bearing Co. v. N. L. R. B.*, 6th Cir. 1963, 325 F. 2d 746.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1281.

TEXACO, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Judgment.

Before: SEITZ, *Chief Judge,* and HASTIE and J. ROSEN, *Circuit Judges.*

THIS CAUSE came on to be heard upon a petition for review, and on a cross-application for enforcement of, an order of the National Labor Relations Board issued on March 25, 1971, against Texaco, Inc., its officers, agents, successors, and assigns. The Court heard argument of respective counsel on January 3, 1972, and has considered the briefs and transcript of record filed in this cause. On May 4, 1972, the Court being fully advised in the premises, handed down its decision denying the petition for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, IT IS ORDERED AND ADJUDGED by the United States Court of Appeals for the Third Circuit that the petition for review filed by Texaco, Inc., be

and hereby is denied; and that the said order of the National Labor Relations Board in said proceeding be enforced, and that Texaco, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against Petitioner.

By THE COURT,
WILLIAM H. HASTIE,
Circuit Judge.

Dated: June 6, 1972

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1281.

TEXACO, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Sur Petition for Rehearing.

Present: SEITZ, *Chief Judge;* and HASTIE, VAN DUSEN, ALDISERT, GIBBONS and J. ROSEN, *Circuit Judges.*

The petition for rehearing filed by TEXACO INC., Petitioner, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,
/s/ COLLINS J. SEITZ,
Chief Judge.

Dated: June 26, 1972

APPENDIX D.

189 NLRB No. 51 D-4764
Philadelphia, Pa.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 4—CA-5117.

TEXACO, INC.

and

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, WESTVILLE LOCAL 8-638.

Decision and Order.

On September 8, 1970, Trial Examiner Gordon J. Myatt issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiners' Decision. Thereafter, Respondent filed exceptions to the Decision and a supporting brief. The General Counsel and the Union filed briefs in answer to Respondent's exceptions and in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondent, Texaco, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[1]

Dated, Washington, D. C. Mar. 25, 1971.

John H. Fanning, Member
Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

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1. In footnote 15 of the Trial Examiner's Decision substitute "20" for "10" days.

CHAIRMAN MILLER, *dissenting:*

During negotiations for a new collective-bargaining contract in December 1968, the Union and the Respondent orally agreed that the former would be permitted to distribute union literature to its members in certain nonwork areas of Respondent's premises during nonwork time provided that the literature did not contain political references, reflections on any ethnic group, or material that was "undesirable."

In January 1970, the Union requested time off for several employees so that they might distribute union literature to union members on company property. Respondent granted permission, but asked for a copy of the literature to be distributed. The Union furnished the copy requested. The literature contained a criticism of Respondent's labor relations conduct at other of its plants, which criticism contained certain untrue statements. It also concluded with a suggestion that the employees mutilate and return their Texaco credit cards to Respondent as a protest. On becoming aware of the contents of the literature, Respondent prohibited its distribution on plant property for the stated reason that the literature was "undesirable" within the meaning of the oral agreement with the Union, in that it contained inaccurate statements about Respondent's labor practices and was encouraging employees to engage in disloyal acts by mutilating and returning their credit cards. Although Respondent refused to permit the distribution in the area sought by the Union, it placed no obstacles in the way of such distribution at the intersection of the plant road and public highway. At this point employees distributed the literature to persons entering and leaving company property. In making the distributions the employees sometimes stood on public property, at other times

on company property. No employee was disciplined for distributing the literature at the intersection.

The Trial Examiner and my colleagues conclude that these facts add up to a violation of our Act. I do not.

The evidence establishes the existence of an oral agreement that the Union would not distribute "undesirable" literature on plant premises. That is a lawful agreement. I find reasonable Respondent's interpretation that the literature here was "undesirable" within the meaning of that agreement. I do not understand how the Act is effectuated by requiring Respondent to deem "desirable" and therefore suitable for distribution literature which is not only inaccurate, but which urges employees to mutilate and return their credit cards, thus encouraging, in effect, a boycott by employees of their Company's own product.

I would dismiss the complaint.

Dated, Washington, D. C. Mar. 25, 1971.

Edward B. Miller, Chairman
NATIONAL LABOR RELATIONS BOARD

TXD-524-70
Philadelphia, Pa.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 4-CA-5117.

TEXACO INC.[1]

and

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, WESTVILLE LOCAL 8-638.

Raymond D. Goodman and *Robert D. Kaplan, Esqs.*, of Philadelphia, Pa., for the General Counsel.

Richard Kirschner, Esq. (*Wilderman, Markowitz & Kirschner*), of Philadelphia, Pa., for the Charging Party.

J. M. Mitchell, Esq., of New York, N. Y., for the Respondent.

Trial Examiner's Decision.

STATEMENT OF THE CASE.

GORDAN J. MYATT, Trial Examiner: Upon a charge filed January 1970,[2] by Oil, Chemical & Atomic Workers International Union, AFL-CIO, Westville Local 8-638

1. The name of the Respondent appears as amended at the trial.
2. Unless otherwise indicate, all dates herein refer to the year 1970.

(hereinafter called the Union), against Texaco, Inc. (hereinafter called the Respondent), a complaint and notice of hearing was issued by the Regional Director for Region 4 on April 30. The substantive allegations of the complaint alleged, *inter alia*, that the Respondent violated Section 8(a)(1) of the Act by refusing to permit its employees to distribute union literature to other employees during nonworking time in nonworking areas at its Eagle Point plant in Westville, New Jersey on or about January 2. The Respondent's answer denied the commission of any unfair labor practices and affirmatively stated that it was not required as a matter of law, to permit the distribution of the type of literature which the Union sought to hand out.

This case was tried before me on June 11 in Philadelphia, Pennsylvania. All parties were represented by counsel and were afforded full opportunity to be heard and to introduce relevant evidence on the issues. Briefs were submitted by all counsel and they have been fully considered by me in arriving at my decision in this case.

Upon the entire record herein, including my evaluation of the testimony of the witnesses, based upon my observation of their demeanor and upon consideration of the relevant evidence, I make the following:

FINDINGS OF FACT.

I. Jurisdictional Findings.

The Respondent is a Delaware corporation engaged in the production, refining and marketing of petroleum and related products. In the course of its business operations the Respondent maintains a number of refineries and other facilities throughout the United States. One such refinery is located in Westville, New Jersey, and is known as the Eagle Point plant. This is the only facility of the Respondent involved in this case.

During the past calendar year, the Respondent's gross volume of sales far exceeded $500,000 and it shipped products to customers in various States of the United States well in excess of $50,000. On the basis of the foregoing, I find that the Respondent is, and has been at all times material herein, an employer within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved.

Oil, Chemical & Atomic Workers International Union, AFL-CIO, Westville Local 8-638 is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices.

A. *The Events Involving the Distribution of Literature on January 2.*

There is no substantial dispute concerning the facts involved in this case. On December 31, 1969, Herbert Ross, an hourly paid employee of the Respondent and president of the Local Union, contacted Johnson Dill,[3] assistant supervisor of employee relations, to request time off during working hours on January 2, for himself and two union officials.[4] Ross explained to Dill that the union official intended to distribute literature to their members on company property on that date. Dill granted permission for the employees to be excused from 7:30 a.m. to 8:30 a.m. and 3 p.m. to 4 p.m. as requested. He also asked for a copy of the literature which the Union intended to distribute,

3. Although Ross testified that he thought he contacted Dill on December 30, 1969, it was apparent from his testimony that he was uncertain of the exact date. Dill manifested no such uncertainty, and placed the date of the request as December 31.

4. The other two union officials were Marinari, secretary of the Union, and Branowsky, second vice president.

and Ross agreed to provide him with a copy as a matter of courtesy and cooperation.

On January 2, the union officials arrived early to make preparations for the distribution of the material to the employees. Marinari went to Dill's office and gave him a copy of the union leaflet while the other two officials remained in the vicinity of the employees' building.[5] When Dill read the bulletin issued by the Union, he asked Marinari to delay the distribution until he had an opportunity to discuss the contents of the leaflet with higher management officials. Shortly thereafter, he instructed Rentz, an employee relations assistant, to go to the union officials to ask them to hold off on the distribution of the literature that morning. Rentz returned and informed Dill that the union officials agreed to do so provided the Respondent paid them for the time they were excused from their duties that morning.[6]

Dill conferred with Dore, supervisor of employee relations, and Tenney, plant manager, concerning the union bulletin. The management officials concluded that the bulletin was "undesirable" because in their opinion the last paragraph contained inaccurate statements about the Respondent's labor practices with the parent union at other facilities and because they felt the Union was encouraging

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5. This building housed the employees' locker and shower facilities and also contained an auditorium. It was located a short distance from the gate house which was the main entrance to the enclosed portion of the plant property. The employees were required to enter through the gate house to clock in or out as they entered or left the premises.

6. Under the arrangement with the Respondent, the union officials were not paid their hourly wages for time that they were excused from work to perform business on behalf of the Union. Ross testified that he felt that the Respondent should pay the men their regular wages because they had not accomplished their mission on behalf of the Union and hence were not entitled to receive payment from the Union for time lost from work.

employees to engage in disloyal acts by mutilating and returning their credit cards to the Respondent.[7]

The management officials concluded that the union bulletin was "undesirable" within the meaning of an understanding reached between the Union and Respondent on December 27, 1968. A decision was then made not to allow the Union to distribute the bulletin to the employees on Respondent's property. Dill verbally communicated management's decision to Ross in the plant. Ross took the position that the union officials intended to see that the bulletin reached the employees and that they would have to make the distribution at the intersection of the plant

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7. The final paragraph of the union bulletin to which the management officials strongly objected read as follows:

> In November, we attended a Texaco Nationwide Council Meeting. Many problems were discussed and One [sic] requires your cooperation if it is to succeed. Over the past several months, Texaco had taken a position of non-recognition of OCAW at various locations in particular, the Ventura District in California and at Sales Terminals in Port Arthur, Houston, Dallas, San Antonio and Fort Worth, Texas, Tulsa, Oklahoma, and Lake Charles, La. Attempts to decertify OCAW, have been made at many other locations, including Claymont, Delaware. This Company is using their power, to influence members of our Union to abandon the principal of unity. We all know, I am sure, what the utimate aim is. Without a strong Union, which we now have, a return to the so-called good old days would only be around the corner. Enclosed, is a suggested letter that you may send along with your mutilated credit card to Texaco Inc. If we let this Company know that their policy of Divide and Conquer [sic] will not succeed, we will all have a happy new year in 1970.

The suggested blank letter attached to the bulletin stated that the employee was returning the credit card because the Company was embarking on an antiunion campaign by refusing to extend customary union conditions of employment to production employees who joined the Union at Ventura, California, and because the Company was rewarding unorganized employees, over and above members of the Union by granting additional wage increases to sales employees at Houston, Texas, who rejected the Union and by refusing to grant such increases to sales employees at Port Arthur, Texas.

road and the public highway.[8] Ross also told Dill that it was entirely possible the copies of the bulletin would get into the hands of the general public since there would be no way to insure that it would be handed only to employees if the distribution were made at this point.

At approximately 1 p.m., Ross sent a written communication to the plant manager, asking for a written statement of Respondent's reasons for refusing to allow the distribution on plant property. The management officials did not reply to Ross' request. At approximately 3 p.m. the three union officers left their jobs and went to the intersection of the plant road and the public highway and shortly thereafter began distributing the material to persons entering and leaving Respondent's premises.[9] There is some uncertainty in the record as to whether the stop sign at the intersection is on public property or whether it is on the Respondent's property. It is clear, however, that the stop sign is positioned near the point of intersection between the Respondent's road and the public thoroughfare. In order to make the distribution, the union officials moved back and forth handing out the literature to occupants of cars entering and leaving the plant. Their movements caused them to be on public property on occasion and at other times they were standing on the Respondent's property. The union officials remained at the intersection of the two roads, passing out the literature, until approximately 5 p.m.

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8. The testimony indicates that prior to December 27, 1968, union literature and material was always distributed to the employees at this intersection.

9. The plant road intersected the public highway at right angles. This road was wide enough to contain a median strip dividing traffic moving in opposite directions and there was a stop sign at the point of intersection with the public highway. The speed limit on the public road, which was a major thoroughfare, was 65 miles per hour. When the shifts changed at the plant, a township policeman was usually stationed at the intersection to expedite the flow of traffic.

B. *The Understanding of December 27, 1968.*

On December 27, 1968, during contract negotiations, the Respondent and the Union dealt with the matter of the distribution of literature on company property in nonworking areas on nonworking time. The Respondent introduced into evidence a copy of its version of the understanding as contained in its minutes of that particular meeting. According to the Respondent's minutes,[10] the Union indicated that it had a desire to communicate with its members by means of "hand-outs" on company property during nonworking hours in nonworking locations. The minutes reflected that the Union did not intend to distribute political, ethnic or other undesirable literature but only "what [was] allowed by law." The minutes stated that the Union had received complaints from the local police because of the traffic congestion which resulted when material was given out at the intersection of the plant and public roads. According to the minutes, the Respondent agreed to allow the Union to distribute literature to the employees between the gate house and the employees' building, or inside the employees' building during inclement weather, provided the Union did not litter the premises and the literature was in keeping with the Union's stated intent. The minutes further indicated that the distribution of literature to the employees in this area would not require prior approval by Respondent's officials, but that they would be given a copy of each handout.

Because of an apparent existing dispute between the Union and the Respondent over the distribution of litera-

10. The testimony clearly indicates that the Union had no control over the content of the minutes taken by management. These minutes represented the Respondent's version of what took place during the bargaining sessions between the parties, and they were not presented to the Union for editing, review or approval.

ture on company property, V. K. Brandeburg, then plant manager, forwarded a copy of the Respondent's summary of the minutes to L. J. Blair, chairman of the Union's Workmen's Committee.[11] In his covering letter, Brandenburg indicated that the minutes were being sent to confirm the understanding reached with the Union concerning the distribution of literature on Respondent's property. Blair did not respond to the letter, but the evidence indicates that the Union withdrew an unfair labor practice charge which was based on this matter.

Blair testified that he was present during the discussion on December 27, 1968, and he recalled that the parties agreed the Union could distribute material in nonworking areas on nonworking time without prior approval of the Respondent. Further, as a matter of courtesy, the Respondent would be given a copy of any literature distributed. Blair also stated that it was his understanding that the Union agreed not to distribute any material which contained political references or cast reflections on any ethnic group or contained material which was "undesirable." He explained that he understood the term "undesirable" to mean material which was profane, vulgar, or socially unacceptable. Blair did not respond to Brandenburg's letter because he felt that the Union should rely upon its own minutes setting forth the understanding, and because he felt that there was no need for further correspondence on the subject since the parties had agreed that the Union could distribute literature on company property without prior approval by management.[12]

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11. The Workmen's Committee was the negotiating arm of the Union.

12. The understanding between the parties concerning the distribution of literature on Respondent's property was never embodied in the collective-bargaining agreement. The only portion of the collective-bargaining agreement relating to union material involved post-

After the understanding of December 27, 1968, the Union and the Respondent had no difficulty with the distribution of union literature and material to the employees until January 2, 1970. The Union made distributions to its members on the Respondent's premises without incident, and on several occasions solicited contributions in support of labor disputes involving employees of other employers at other plants. The testimony also indicates that on occasion the Respondent made use of the area between the gatehouse and the employees' building to solicit contributions for charitable purposes from the employees.

CONCLUDING FINDINGS.

The Respondent argues that it could lawfully prohibit the distribution of the literature by the Union on plant premises because the material incited the employees to engage in an act of disloyalty to th employer and because the literature contained "outright and blatant untruths." The Respondent contends that under the terms of the "understanding" of December 27, 1968, it could declare the bulletin undesirable and prohibit its distribution on plant property. As a secondary argument the Respondent claims that the understanding of December 27, 1968, constituted a waiver by the Union of the right to distribute material on company premises which the Respondent deemed undesirable, even though entitled by law to make such distribution. The Respondent further urges that the dispute rests upon the interpretation of the word "undesirable" as contained in the understanding, and the matter should be

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12. (Cont'd.)
ing notices on the plant bulletin board. This section of the contract (Article XII, Par. I) provided as follows:

> The Union shall be provided exclusive space on a bulletin board for its use. All notes and bulletins must be approved by the Plant Manager before being posted.

resolved under the arbitration provisions of the collective-bargaining agreement rather than by the decisional processes of the Board. The Respondent also points out in its brief that the Union had an alternative means of making the distribution to the employees, and did so, by passing out the literature at the intersection of the company road and the public highway.

The General Counsel and the Union contend that the distribution of the leaflet in nonworking areas on nonworking time could not lawfully be proscribed by the Respondent in the absence of a showing that it would interfere with plant discipline and production. The General Counsel and the Union further urge that any inaccurate statements contained in the bulletin, absent a showing of willful and malicious intent, were not sufficient to remove its distribution from the protection of Section 7 of the Act.

The development of the law on the general proposition of union solicitation and distribution of the literature on an employer's premises has, of necessity, been an effort to achieve a reasonable balance between the statutory right of employees to organize and assist unions and the right of an employer to control the use of his property. "Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *N. L. R. B. v. Babcock & Wilcox Company*, 351 U. S. 105, 112. It is to this end that the Board and Courts have developed various guidelines and presumptions against which the facts of a given case must be measured; with the obvious caveat that the standards must not be applied in a mechanical fashion, but must take into account the peculiar circumstances of each case considered.

Thus, in *Peyton Packing Co.*, 49 NLRB 828, enfd. 142 F. 2d 1009 (C. A. 5, 1944), the Board held:

> The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside the working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.

This language was approved by the Supreme Court in *Republic Aviation Corporation v. N. L. R. B.*, 324 U. S. 793, and specifically reaffirmed, with respect to employees, in that Court's later decision in *Babcock & Wilcox, supra*. However, in the *Babcock* case the Supreme Court made a distinction between union solicitation and distribution by employees as contrasted with similar activity by nonemployees. The Court found that except where it might be shown that the employees were inaccessible, an employer need not allow nonemployees to solicite or to distribute material on behalf of a union on company property.

Subsequently the Board developed a further refinement, taking into account for the first time the distinction

between oral solicitation and the distribution of literature to employees on company property. The Board held that the written message was designed for reading or rereading at the employees' convenience, and this purpose would be achieved as long as the literature was received. From this evolved the rule that the statutory right to organize would be satisfied insofar as the distribution of literature was concerned when the employees had access to nonworking areas of the plant premises. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 621.

Considering the facts of the instant case in the light of the above general principals developed by the Board and the Courts, it is clear that here the union officials, as employees, had the protected right to distribute the material on January 2, in the nonworking area on the Respondent's premises absent a showing that the distribution would in some manner be destructive of plant production or discipline. Furthermore, the facts clearly refute any claim that the distribution would have been detrimental to production or discipline. The testimony indicates that from the time of the understanding on December 27, 1968, until the date of the refusal on January 2, both the Union and the Respondent customarily utilized this area to make oral solicitations and to effectuate distribution of literature of various kinds to the employees.

But the Respondent argues that the issues go beyond the maintenance of production and discipline on its property. The Respondent claims that the last paragraph of the union leaflet encouraged employees to engage in acts of disloyalty by urging them to mutilate and return their credit cards to the Respondent. In support of this argument, the Respondent relies heavily on the *Jefferson Standard Broadcasting Company* case.[13] In that case the union

13. 94 NLRB 1507, enfd. *sub nom. N. L. R. B. v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U. S. 464.

represented the broadcasting company's technicians and was engaged in a bitter dispute with the employer over contract negotiations for an extended period of time. After the parties were unable to resolve their differences, the employees began to picket the employer's establishment with signs criticizing the content of the programs broadcast by the radio station. They also distributed handbills to the general public which contained criticism of the content of the employer's broadcasts and television programs and indicated that the community was being treated as "a second class city" by the company. The employer considered the picket sign legends and the handbills to be a demonstration of "detrimental disloyalty" which gave him the right to discharge the picketing technicians for cause. The Supreme Court, in a divided opinion, held that the employees' criticism of the programs did not relate to the company's labor practices but, rather, was a [disloyal] attack by the employees upon the very interest which they were being paid to conserve and develop. The Court reasoned that this constituted sufficient "cause" under the Act to sustain the discharge.

By analogy, in the instant case, the Respondent contends that the appeal to the employees to mutilate and return their credit cards was sufficiently disloyal to allow it to conclude that the bulletin was undesirable and to remove its distribution from the protection of the Act. I find the Respondent's reasoning in this regard to be faulty. As pointed out in the Union's brief, the employees' appeal to the general public in *Jefferson Standard* was entirely unrelated to the labor dispute which the Union had with the employer. Indeed, the Court goes to great lengths to demonstrate that the criticism of the program content of the employer's broadcasts was completely divorced from the labor practice of the employer and made no reference to wages, hours or working conditions. *Ibid.* p. 476. In the

instant case, however, the Union was urging the employees to make common cause with other employees of the Respondent who were represented by sister locals of the same International Union. In these circumstances, it is clear that the Union was concerned about the Respondent's overall labor practices which could conceivably impact upon the treatment of the employees represented by the Union at the Eagle Point facility. Furthermore, the union bulletin was not critical of the Respondent's products or services, but rather of the labor practices followed by the Respondent at other facilities.

Thus, I find that *Jefferson Standard* is inapposite to the issues presented by the facts of this case. Here the Union was seeking to have its members demonstrate their displeasure with the unsatisfactory treatment they felt members of sister locals of the same Union were receiving from the Respondent at other facilities. The appeal to mutilate and return the credit cards as a means of registering their protest against these practices at other facilities was nothing more than an appeal for a symbolic gesture to make the Respondent aware of their dissatisfaction. The Union's appeal was limited to employees and did not contemplate support from the public at large, nor was the leaflet in any way critical of the products produced by the Respondent. Moreover, under the Respondent's theory, it could classify any union literature undesirable because it contained statements against the Respondent's interest, and thus take from the employees a right granted by statute. Indeed, Dill testified that management considered any adverse action by an employee against the Company to be disloyal. This is hardly an acceptable standard to be applied in the give and take found in the arena of labor relations. As Mr. Justice Frankfurter stated in his dissent in *Jefferson Standard*, "[m]any of the legally recognized tactics and weapons of labor would readily be condemned

for 'disloyalty' were they employed between man and man in friendly personal relations." *Ibid.* pp. 479-480. I find therefore, that the last paragraph of the Union's leaflet did not call for the type of "disloyal" conduct condemned in *Jefferson Standard*, and further that the distribution of the leaflet on the Respondent's premises was in no way removed from the protection accorded such activity by Section 7 of the Act. Cf. *Sears, Roebuck & Co.*, 168 NLRB No. 126.

The Respondent's other major contention that the union leaflet contained untruthful statements and thus justified the prohibition of its distribution is, in my judgment, also without merit. There is no question concerning the fact that the leaflet was not artfully drafted. In the last paragraph the Union accused the Respondent of having taken a position of "nonrecognition of OCAW" at various other facilities when in fact the Respondent had recognized the Union at some of these locations but had been engaged in hard bargaining. Ross testified he meant by "nonrecognition" that the Respondent had refused to reach agreements or negotiate in good faith with the locals representing the employees at the locations stated in the leaflet. However, it was not his subjective meaning, as explained at the trial, but rather the plain meaning of the words contained in the leaflet which prompted the Respondent's officials to react. But even though the leaflet was worded in such an inaccurate fashion so as to convey an impression that the Respondent had refused to recognize other locals of the International Union, it does not necessarily follow that the distribution of the document loses the protection of the Act. It is well settled that misstatements made in the course of concerted activity which denounce an employer for his conduct in labor relations, or in affairs germane to the employment relationship, only forfeit the statutory protection when it is evident that the statements

are deliberately or maliciously false. *Owens-Corning Fiberglas Corporation*, 172 NLRB No. 20; *Bowling Green Manufacturing Co.*, 169 NLRB No. 15; *El Mundo Broadcasting Corp.*, 108 NLRB 1270; *Schnell Tool and Die Corp. v. N. L. R. B.*, 359 F. 2d 39, 44 (C. A. 6); *Walls Manufacturing Company v. N. L. R. B.*, 321 F. 2d 753, 754 (C. A. D. C.), cert. denied 375 U. S. 923.

It is apparent here that the Union's statements were not deliberately or maliciously inaccurate. This finding is not based on Ross' testimony as to the meaning he intended to convey, but by examination of the form letter attached to the leaflet. This letter was a suggested model for a covering letter, when and if the employee returned his credit card to the Respondent. The letter stated with specificity that the sender of the credit card was doing so in protest of an alleged refusal of the Respondent to extend union conditions to employees represented by the International Union at Ventura, California, and because of an alleged claim that the Respondent gave benefits to unorganized employees at one installation in Texas and refused to grant similar increases to members of the Union at another installation in Texas. Thus, it is quite evident that the attached letter qualified the imprecise use of the word nonrecognition in the leaflet, and spelled out to the recipient the precise complaint which the union officials were making known to its members. In these circumstances, it can hardly be said that the statements in the union leaflet were deliberately or maliciously false. Accordingly, I find that this was not a legally valid reason for the Respondent to proscribe distribution of the union leaflet on its premises.

The Respondent also argues, however, that the understanding of December 27, 1968, constituted a waiver on the part of the Union of the statutory right to distribute any

literature which the Respondent deemed undesirable. This position is predicated upon the Respondent's summary of its minutes, which it is claimed constitute an agreement between the parties. The Respondent contends that when a copy of the minutes was sent to the Union as confirmation of the understanding, the Union's failure to respond to the covering letter indicated acquiescence and acceptance of the agreement as the minutes stated it. The General Counsel, on the other hand, states that the right to distribute literature on an employer's premises is an individual right of the employees which cannot be waived by a collective bargaining representative. In this connection the General Counsel cites *N. L. R. B. v. Mid-States Metal Products, Inc.*, 403 F. 2d 706 (C. A. 5, 1968) and *General Motors Corp.*, 158 NLRB 1723. As attractive as this theory may be, I find no need to tread in this thicket. In my judgment it is not necessary to the resolution of the issues here to determine whether the Union could waive this particular statutory right by agreement. I find that the understanding of December 27, 1968, does not constitute a waiver in any respect. Blair's testimony made it quite clear that the Union's interpretation of the term "undesirable" differed materially from that of the Respondent's officials. The Board has repeatedly said that a waiver of a statutory right will not be lightly inferred and that it must be expressed in "clear and unmistakable terms." *Timken Roller Bearing Company v. N. L. R. B.*, 325 F. 2d 746 (C. A. 6); *Unit Drop Forge Division, Eaton Yale & Towne, Inc.*, 171 NLRB No. 73; *C & C Plywood Corporation*, 148 NLRB 414, 416. The record here amply demonstrates that the parties were not in agreement regarding the definition and the scope of the term "undesirable." Hence, it cannot be said the understanding was elevated to a clear and unmistakable agreement which waived an important right conferred by statute.

In rejecting the Respondent's waiver argument, I also reject the claim that differences over the understanding should be resolved under the arbitration provisions of the contract rather than by the Board. The understanding concerning the distribution of union literature on the Respondent's property was never embodied in the collective bargaining agreement or memorialized in any way except in the minutes of the parties—and this is in dispute. I find that the Board's jurisdiction over this matter is properly asserted here because the issues do not involve construction of the terms of the collective bargaining agreement in effect between the parties.

One final argument merits mention here. The Respondent indicates that the Union did in fact make its distribution at the intersection of the public highway and the company road. Thus the Respondent argues that there was an alternative method of distribution available to the Union. This misconceives the distinction between the rights of employees and nonemployees as set forth in *Babcock & Wilson, supra.* As employees, the union officials had the right, in the absence of a showing that it would interfere with production or discipline, to distribute the literature to the employee-members on nonworking time in nonworking areas on the Respondent's premises. To require them to leave the company property and make the distribution at the intersection of the public highway is an unlawful abrogation of these rights.

On the basis of the above, I find that the Respondent violated Section 8(a)(1) of the Act by refusing to allow the Union to distribute the leaflet to the employees on Respondent's premises during nonworking time in nonworking areas on January 2, 1970.

CONCLUSIONS OF LAW.

1. Texaco Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Oil, Chemical & Atomic Workers International Union, AFL-CIO, Westville Local 8-638, is a labor organization within the meaning of Section 2(5) of the Act.

3. By prohibiting employees who were officials of the Union from distributing union leaflets to employees in nonworking areas on nonworking time on January 2, 1970, the Respondent interfered with, restrained and coerced its employees in the exercise of rights guaranteed under Section 7 of the Act and violated Section 8(a)(1) of the Act.

THE REMEDY.

Having found that the Respondent has engaged in unfair labor practices, I shall recommend the issuance of an order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Accordingly, upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, pursuant to Section 10(c) of the Act, I make the following:

Recommended Order.

Respondent, Texaco Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Prohibiting employees who are officials of Oil, Chemical & Atomic Workers International Union, AFL-CIO, Westville Local 8-638, from distributing union literature to employees at the Respondent's Eagle Point plant in nonworking areas on nonworking time.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act.

(a) Post at its Eagle Point plant in Westville, New Jersey, copies of said notice attached hereto and marked "Appendix."[14] Copies of said notice on forms provided by the Regional Director for Region 4 shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director in writing, within 20 days from the date of the receipt of this Decision and Recommended Order what steps have been taken to comply herewith.[15]

Dated at Washington, D. C.

GORDON J. MYATT,
Gordon J. Myatt,
Trial Examiner.

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14. In the event that no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Regulations Board, the findings, conclusions, recommendations and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes. In the event the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

15. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 4, in writing within 10 days of this Order, what steps have been taken to comply herewith."

Form NLRB-4710
(9 69)

TXD-

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE HEREBY NOTIFY ALL OF OUR EMPLOYEES THAT

WE WILL NOT prohibit employees who are officers [illegible] OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, WESTVILLE LOCAL 8-638, from [illegible] tributing union handouts and bulletins to employees [illegible] our plant premises during nonworking hours in [illegible] working areas.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in exercise of their rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

TEXACO INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 1700 Bankers' Securities Building, Walnut and Juniper Streets, Philadelphia, Pennsylvania 19107 (Telephone No. (215) 597-7601).

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-383

TEXACO INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 462 F.2d 812. The Board's decision and order (Pet. App. A10-A34) are reported at 189 NLRB No. 51.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7-A8) was entered on June 6, 1972, and a timely

petition for rehearing was denied on June 26, 1972 (Pet. App. A9). The petition for a writ of certiorari was filed on September 5, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the company violated Section 8(a)(1) of the National Labor Relations Act by refusing to allow employees to distribute union literature in a nonwork area of the plant during nonwork time, without regard to whether there existed adequate off-plant channels for the distribution of such literature.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3.

STATEMENT

Pursuant to an agreement reached in 1968 with Local 8-638 of the Oil, Chemical and Atomic Workers Union, which represented the employees at its Eagle Point refinery, the Company authorized the distribution of union literature during nonwork time, on an open area of its premises between the gatehouse entrance to the plant and the employees' building. The Union, in turn, agreed that it would not distribute "political, ethnic or other undesirable literature" (Pet. App. A20).

On December 31, 1969, the Company declined to permit distribution of a union leaflet on Company property on the ground that it contained "undesirable" material (Pet. App. A16-A18).[1] The Union then distributed the leaflet off Company property at the entrance to the plant, and filed unfair labor practice charges against the Company for its refusal to permit distribution at the approved distribution site at the refinery (Pet. App. A19).

The Board, applying its long-established rule that employees have a right to distribute union literature on nonwork areas of company property during nonwork time unless it is shown that the distribution

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[1] The leaflet was a general year-end information bulletin addressed to the Union membership. Its concluding paragraph stated:

> In November, we attended a special Texaco Nationwide Council Meeting. Many problems were discussed and One requires your cooperation * * *. Over the past several months, Texaco has taken a position of nonrecognition of OCAW at various locations in particular, the Ventura [Producing] District in California and at Sales Terminals in Port Arthur, Houston, Dallas, San Antonio and Fort Worth, Texas, Tulsa, Oklahoma, and Lake Charles, La. Attempts to decertify OCAW, have been made at many other locations, including Claymont, Delaware. This Company is using their power, to influence members of our Union to abandon the principle of unity. * * * Without a strong Union, which we now have, a return to the so-called good old days would only be around the corner. Enclosed, is a suggested letter that you may send along with your mutilated credit card to Texaco Inc. If we let this Company know that their policy of Divide and Conquer will not succeed, we will all have a happy new year in 1970. [Pet. App. A18, n. 7.]

would interfere with production or discipline, concluded that the Company violated Section 8(a)(1) of the Act by precluding the employees from distributing the leaflet on the open area at the refinery (Pet. App. A23-A25, A32). The Board found that the appeal to Union members to return their Company credit cards did not urge the type of disloyalty that would remove the appeal from the protection of Section 7 of the Act; that statutory protection was not forfeited because of misstatements made in the leaflet, for they were not "deliberately or maliciously false"; and that the Union had not waived its right to distribute the leaflet by orally agreeing not to distribute "undesirable" material (Pet. App. A27-A30).[2] Finally, the Board found that the Company's reliance on the availability of the public highway for distribution purposes as a justification for refusing use of its property to its employees "misconceives the distinction between the rights of employees and nonemployees as set forth in *Babcock & Wilcox*," 351 U.S. 105 (Pet. App. A31). The Board ordered the Company to cease and desist from the unfair labor practice found (Pet. App. A32-A33).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. A1-A6).

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[2] The Board rejected the Company's contention that the question whether the pamphlet was "undesirable" should be resolved under the arbitration provisions of the collective bargaining agreement, on the ground that the understanding concerning the distribution of union literature was not part of that agreement (Pet. App. A31).

ARGUMENT

1. In *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, this Court sustained the Board's holding that an employer may not lawfully prohibit employees from distributing union literature on company property during nonworking time, unless it were shown that such a ban is necessary in order to maintain production or discipline. Petitioner contends, however, that, since the employees here were already represented by a union, their right to distribute union literature on the employer's property is no greater than that of nonemployee organizers, who are entitled to access to the employer's property only if there are no alternative means of reaching the employees (see *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105). The Board and the court below properly rejected this contention.

There is no valid reason why employees who are organized should have any less right to engage in Section 7 activity on their employer's property than do employees who are not yet organized. A different rule is warranted with respect to nonemployees because they, unlike employees, are outsiders who have not been invited by the employer to spend their day performing work for him on his premises. *Babcock & Wilcox, supra*, and *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, upon which petitioner relies, are not to the contrary. These cases involved nonemployees, and in *Babcock & Wilcox*, the Court specifically stated that the "distinction between rules of law applicable to employees and

those applicable to nonemployees" was "one of substance" (351 U.S. at 113):

> No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. * * * But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration.[8] * * *

2. Contrary to petitioner's assertion (Pet. 10), there is no conflict among the courts of appeals with respect to the issue presented here. The opinion below, as petitioner acknowledges (Pet. 11), is in accord with decisions of the other courts of appeals. The conflict to which petitioner points is one that may have existed between the decisions of the court below and other circuits prior to the decision in the case at bar. Compare *Diamond Shamrock Co.* v. *National Labor Relations Board*, 443 F.2d 52 (C.A. 3), with *National Steel Corp., Great Lakes Steel Div.* v. *National Labor Relations Board*, 415 F.2d 1231

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[8] *National Labor Relations Board* v. *United Steelworkers of America*, 357 U.S. 357, cited by petitioner (Pet. 10), involved the narrow question whether an employer who has adopted a no-solicitation rule, the validity of which was not contested (357 U.S. at 362), commits an unfair labor practice by enforcing the rule against employees where the employer engages in anti-union solicitation. It was only in this limited context that the Court indicated that the alternative means of communication available to the union was a relevant factor in determining whether the no-solicitation rule had been fairly applied (*ibid.*).

(C.A. 6); *Republic Aluminum Co.* v. *National Labor Relations Board*, 394 F.2d 405 (C.A. 5, *en banc*); and *National Labor Relations Board* v. *United Aircraft Corp., Pratt & Whitney Aircraft Div.*, 324 F.2d 128 (C.A. 2), certiorari denied, 376 U.S. 951.

The court of appeals, however, resolved the conflict by distinguishing its earlier decision in *Diamond Shamrock* (Pet. App. A3). That case involved the right of off-duty employees to distribute literature in an area of the plant where they had no authority to be at the time in question (443 F.2d at 56). The employees here, on the other hand, were on-duty employees, lawfully and properly on company premises. *National Labor Relations Board* v. *Rockwell Manufacturing Co.* (*Du Bois Div.*), 271 F.2d 109 (C.A. 3), with which petitioner also claims a conflict (Pet. 10), has some broad language but held only that, where the company has come forward with evidence showing that its ban on employee distribution "was premised on its desire to 'serve production, order and discipline' " and was "enforced * * * to maintain order", the Board must consider alternative means of communication in assessing the reasonableness of the company's ban (271 F.2d at 115-116). Here, however, there was no showing of production or disciplinary necessity, but merely a contention that the content of the leaflet justified a ban on its distribution—a contention that both the Board and the court of appeals rejected on the merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

[redacted]
Solicitor General.

[redacted]
General Counsel,

[redacted]
Associate General Counsel,

[redacted]
Assistant General Counsel,

[redacted]
Attorney,
National Labor Relations Board.

[redacted]